No. 79-805

In the Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U.S.
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COMMUNITY CASH STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 3a-11a) are reported at 238 N.L.R.B. No. 29.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1979. A petition for rehearing was denied on August 23, 1979. The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Company was responsible for the coercive acts of a non-supervisory employee who other employees could reasonably believe was acting on its behalf.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3.

STATEMENT

Petitioner ("the Company") is engaged in the retail grocery business and maintains a warehouse in Spartanburg, South Carolina. In August 1977, a complaint was filed with the National Labor Relations Board charging the Company with having engaged in certain unfair labor practices with respect to the Company's warehouse employees. The Board concluded that the Company had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interfering with, restraining and coercing its employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. 157, and, in addition, that the Company had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by imposing onerous working conditions on three employees to discourage union membership. In accordance with these conclusions the Board entered a remedial order (Pet. App. 3a-41a). The court of appeals granted enforcement of the Board's order (Pet. App. 1a-2a).

1. The sole question raised in the petition concerns the Board's finding that the Company committed certain violations of Section 8(a)(1) through the actions of employee Leon Clowney. The underlying facts relevant to this finding are as follows:

In the Spring of 1977, the Union[1] began a campaign to organize the Company's warehouse employees (Pet. App. 31a; A. 91-92).[2] On April 25, the Union filed an election petition with the Board (Pet. App. 15a; A.190). Four days later, the Company's president convened an employee meeting during which he stated that if the Union won the election, employees would no longer be able to discuss their individual problems with management and that the Union would bring the employees "serious harm" (Pet. App. 15a-16a; A. 190-191, 198-204).

Immediately following this meeting, one of the Company's more experienced employees, Leon Clowney, approached employee Williams, inquired whether Williams had signed a Union card and asked him whether he would like to perform strenuous manual labor on the railroad loading dock (Pet. App. 5a; A. 81-82). Soon afterwards, Clowney advised forklift operator McCollum that the Union would do him no good, and McCollum replied that he was his own man. Two weeks later, McCollum was transferred to unloading trucks and later to unloading railroad cars (Pet. App. 35a; A. 116-119).

In May, Clowney asked employee Cromer whether he had signed a union card and stated that, if Cromer had signed, he should "do something about it." Clowney further stated that the Union was no good for Cromer and offered to accompany Cromer to the president's office where Cromer could sign a statement repudiating the Union. The following day, Clowney again told Cromer to sign the statement. Within the next several

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[1]Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 108.

[2]"A." refers to the appendix in the court of appeals.

days, Supervisor Davis urged Cromer to "do something about" his union card and told him to sign the statement. Cromer agreed to sign, and Supervisor Dawkins told him to wait in a meeting room while Dawkins summoned employee Clowney. Clowney arrived and gave Cromer the statement requesting the return of his union card, which Cromer signed. (Pet. App. 6a-7a, 23a-24a; A. 106-114.)

Also in May, Clowney told employees Meadows and Scott to stay away from the Union, that the Union would hurt employees and that they should sign a statement in the office to get their union cards back (Pet. App. 25a-26a; S.A. 1-3, A. 132-133).[3] In the company of Supervisor Dawkins, Clowney told employee Johnson that he had heard that Johnson was promoting the Union and had been elected steward at a recent Union meeting (Pet. App. 6a, 22a-23a; A. 93-95). A few weeks later, when Johnson returned from a hospital stay, he was transferred to unloading watermelons by hand and his forklift position was given to employee Cromer (Pet. App. 6a-7a, 32a; A. 100-102).

In June, Clowney told employee Rogers that something was going to happen to certain employees and asked whether Rogers was sorry he had signed a union card (Pet. App. 26a; S.A. 4). Clowney offered to trade vacation times with employee Williams if Williams would sign the anti-union statement. Williams refused, and 20 minutes later he was permanently transferred to the railroad loading dock. (Pet. App. 5a-6a, 22a, 31a; A. 83-86.) In addition, Clowney told employee Johnson that

[3]"S.A." refers to the supplemental appendix to the Board's brief in the court of appeals.

the Company had always been good to Johnson and that he should sign the statement to get his union card back (Pet. App. 6a, 23a; A. 95-96).

2. The Board, modifying the decision of the Administrative Law Judge,[4] found that Leon Clowney had the apparent authority to act for the Company in its anti-union campaign and that the Company therefore violated Section 8(a)(1) of the Act through the interrogations, threats, offer of benefit, creation of the impression of surveillance, and inducements to abandon the Union committed by its agent, Clowney (Pet. App. 4a-9a). The Board noted that two Company supervisors cooperated with Clowney's efforts to obtain an employee signature on the anti-union statement and that Clowney's predictions of Company retaliation for union support came true almost immediately (*id.* at 8a). The Board concluded (*id.* at 8a-9a; footnote omitted):

> Clowney's activities focused on the solicitation of statements from prounion employees repudiating their union affiliation, conduct in which [the Company] could not lawfully engage. He acted as [the Company's] emissary with respect to procuring such statements. His solicitation campaign was implicitly adopted and supported by at least one of [the Company's] supervisors. The circumstantial connection between Clowney's activities and [the Company's] conduct in transferring employees strongly suggests a concerted effort, especially where Clowney accurately predicted the consequences of a

[4]Although it agreed with the Administrative Law Judge's conclusion that the Company was responsible for Clowney's actions, the Board did not adopt the Administrative Law Judge's rationale that the Company had explicitly condoned and ratified Clowney's conduct (Pet. App. 4a).

> failure to repudiate the Union. Based on these factors and the record as a whole, we conclude that the employees would reasonably believe that Clowney reflected company policy, and spoke and acted for management. Accordingly, we find that Clowney had the apparent authority to act for [the Company].

In granting enforcement of the Board's order, the court of appeals held that substantial evidence supported the Board's findings (Pet. App. 1a-2a).

ARGUMENT

The Company contends that the Board applied an improper standard in holding it responsible for the coercive acts of its employee, Clowney, and maintains that it could not be found responsible for Clowney's acts in the absence of "directives, instructions or other [such] manifestations" of its conferral of authority upon him (Pet. 10). There is no merit to these contentions.

1. In *International Association of Machinists* v. *NLRB.*, 311 U.S. 72 (1940), the Court held that an employer was responsible for its employees' coercive acts where the other employees "would have just cause to believe that [their co-workers] were acting for and on behalf of management." *Id.* at 80. The Taft-Hartley amendments to the Act did not disturb that standard for determining apparent authority. Taft-Hartley modified the language of Section 2(2) of the Act, 29 U.S.C. 152(2), to limit the liability of employers for the acts of third persons to situations in which the third persons act as agents of the employer.[5] However, Section 2(13) of the amendments, 29 U.S.C. 152(13), made it clear that

[5]Former Section 2(2) provided that the term employer included "any person acting in the interest of an employer."

the term "agent" in Section 2(2) is not restricted to one possessing actual authority but encompasses as well those exercising apparent authority.[6]

Contrary to the Company's contention (Pet. 8-10), there is no doubt among the circuits over the continued vitality of the *International Association of Machinists* standard. See, *e.g.*, *C and W Super Markets, Inc.* v. *NLRB*, 581 F. 2d 618, 624 n.7 (7th Cir. 1978); *Helena Laboratories Corp.* v. *NLRB*, 557 F. 2d 1183, 1187 (5th Cir. 1977); *NLRB* v. *American Casting Service, Inc.*, 365 F. 2d 168, 173 (7th Cir. 1966); *NLRB* v. *Arkansas-Louisiana Gas Co.*, 333 F. 2d 790, 795-796 (8th Cir. 1964); cf. *Furr's, Inc.* v. *NLRB*, 381 F. 2d 562, 566 (10th Cir. 1967); *Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *NLRB*, 547 F. 2d 575, 585 (D.C. Cir. 1976).

The cases relied on by the Company (Pet. 8-9) do not hold otherwise. The Eighth Circuit, in *NLRB* v. *Arkansas-Louisiana Gas Co.*, *supra*, 333 F. 2d at 795-796, rejected the argument that the Taft-Hartley amendments had invalidated the standard enunciated by *International Association of Machinists* v. *NLRB*, *supra*. The Company's reliance (Pet. 9) on another Eighth Circuit decision, *NLRB* v. *Sayers Printing Co.*, 453 F. 2d 810, 817 (1971), is misplaced. *Sayers Printing* did not involve any allegation that employees were acting with apparent authority. There the court, reversing the Board's finding of supervisory status, held that because

[6]Section 2(13) states:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

there was no evidence that the employees acted at the direction of management, the employer was not liable for their actions. However, the Board's determination of employer responsibility was based solely on a finding of supervisory status pursuant to Section 2(11) of the Act, 29 U.S.C. 152(11) (185 N. L. R. B. 837, 840-843 (1970)), and contained no analysis of circumstances under which employers may bestow apparent authority upon non-supervisory personnel. Having reversed the Board's finding of supervisory status (453 F. 2d at 813-815), the court therefore had before it no basis for holding the employer liable.

The Fifth Circuit has also held that an employee possesses apparent authority where employees "could reasonably believe that she spoke on behalf of management." *Helena Laboratories Corp.* v. *NLRB*, *supra*, 557 F. 2d at 1187. *NLRB* v. *Big Three Industrial Gas and Equipment Co.*, 579 F. 2d 304, 309-310 (5th Cir. 1978), cert. denied, 440 U.S. 960 (1979), cited by the Company (Pet. 9), did not question the standard applied in *Helena Laboratories*. That case dealt with the question of the evidence required by an employer to rebut the presumption that a *supervisor's* coercive acts are attributable to the employer. And in *NLRB* v. *Solboro Knitting Mills, Inc.*, 572 F. 2d 936, 941 (2d Cir. 1978), upon which the Company also relies (Pet. 8-9), the Second Circuit upheld the Board's finding of employer responsibility for the acts of a non-supervisory employee, in circumstances similar to those of the instant case, where "[t]he employees' belief that [the employee-agent] spoke—at least on the topic of unionization—with the authority of management" was fortified by management knowledge and apparent support of the anti-union statement solicited by the employee-agent.

There is no substance to the Company's additional assertion (Pet. 8) that the Board "holds for all practical purposes that virtually any employee who openly acts in opposition to a union is an agent of the company." The Board's test is not, as the Company would have it (Pet. 10), the subjective belief of the employees, but whether, under all the circumstances, they could reasonably believe their co-worker to be acting for the employer (see cases cited at page 7, *supra*). Here, the record evidence demonstrates that employees who resisted Clowney's anti-union solicitations were promptly transferred to more onerous work, that Clowney initiated at least one of his anti-union solicitations in the presence of an admitted supervisor, and that Company officials directed an employee to meet with Clowney to prepare his statement repudiating the Union. These facts fully support the Board's finding (Pet. App. 8a) that Clowney acted as the Company's "emissary."[7]

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[7]While the Board is not bound by strict common law agency principles in determining apparent authority (see *Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *NLRB*, *supra*, 547 F. 2d at 585, citing *International Association of Machinists* v. *NLRB*, *supra*, 311 U.S. at 80), those principles, which hold that apparent authority is that which persons can reasonably believe an agent possesses based upon the observable conduct of the principal and the agent, are met here. Thus, in *Frank Sullivan Co.* v. *Midwest Sheet Metal Works*, 335 F. 2d 33, 40 (8th Cir. 1964), relied on by the Company (Pet. 7), the court, in finding sufficient apparent authority to bind a principal to a contract negotiated by his agent, stated that "[l]iability can be imposed upon a principal only 'for that appearance of authority caused by himself.' " It was the Company's actions here in making good on Clowney's threats and aiding his efforts in soliciting signatures on the anti-union statement that provided reasonable cause to support a belief that Clowney acted as the Company's agent. The Company cites no authority for its suggestion (Pet. 10) that apparent authority must be based on such manifestations as "directives [or] instructions."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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